Once more unto the breach: *R (Privacy International) v Investigatory Powers Tribunal*

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1. Introduction

The classic modern framing of the British constitution sets up a contest between the Diceyan orthodoxy of the sovereignty of Parliament and the constitutional value of the rule of law, understood – most often – to mean at its heart the availability of judicial review.[1] The decision of the Supreme Court in *R (Privacy International) v Investigatory Powers Tribunal*[2] offers, first of all, important insight into the balance between these two concepts within the contemporary constitution. There, the Court continued a now-venerable tradition of holding that particular ouster clauses failed in what we must assume was their intended effect, while leaving open the possibility that some other, as yet hypothetical, clause might succeed in shielding the acts of some body from the supervisory jurisdiction of the High Court.[3] Beyond that, however, the judgment offers the suggestion that it might yet be possible to transcend that framing, protecting the rule of law without rejecting Parliamentary sovereignty as the bedrock of the constitution. Both of these elements, however, are predicated – and this is a third point – upon a subtle but vital rejection of the national security framing of the judgments of the lower court, possible only because of an earlier, separate, decision of the Supreme Court.

2. Background

The Investigatory Powers Act 2016 provides for a right of appeal from the Investigatory Powers Tribunal ('IPT') – the body which adjudicates upon, amongst other things, the legality of various forms of state surveillance[4] – to the Court of Appeal in England and Wales, or the Inner House of the Court of Session in Scotland.[5] Before the relevant provisions were brought into force, there was no such right of appeal: the Regulation of Investigatory Powers Act 2000 ('RIPA') permitted

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[1] See the discussion in *Jackson v Attorney General* [2005] UKHL 56 and, in particular, the various accounts of which of the two principles should, in extremis, take priority.

[2] *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22.

[3] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

[4] The jurisdiction of the IPT is a notoriously knotty question, complicated by the fact that some of the provisions which assign certain categories of case to it have never been brought into force: see Regulation of Investigatory Powers Act 2000, s 65.

[5] Investigatory Powers Act 2016, s 242, inserting a new s 67A into the Regulation of Investigatory Powers Act 2000.

the Secretary of State to make provision for one, but that power was never exercised.[6] What, then, if the IPT erred in law? The answer to that question turns on the interpretation of section 67(8) of RIPA, which provides that 'determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not… be liable to be questioned in any court.' Does this 'ouster clause' have the effect of excluding judicial review of Tribunal decisions? If not, could any such clause ever do so?

The RIPA ouster clause bears a striking resemblance to that held in *Anisminic v Foreign Compensation Commission*[7] not to shield the Commission from the supervisory jurisdiction of the courts on the basis that the error of law it had committed had rendered the Commission's decision a mere nullity and so deprived it of the ouster clause's protection. Against that background, the parenthetical words of the RIPA clause (not present in its predecessor) might be thought to represent an attempt to counter the logic of *Anisminic* by extending the clause's protection to those decisions which contain an error of law that would have the effect of depriving the IPT of jurisdiction. If so, it is notable that the relevant words fell far short of the unambiguously *Anisminic*-proof ouster clause in the Asylum and Immigration (Treatment of Claimants etc) Bill 2003.[8] That clause's inclusion provoked a constitutional storm and prefigured the (in)famous remarks of a number of the Law Lords, in *Jackson v Attorney General*, to the effect that the courts might at some point in the future be willing to hold the rule of law to be the higher value than the sovereignty of Parliament.[9] That is, there was – it was suggested – at least one thing that the legislature might be unable to do: exclude of certain acts or decisions from the supervisory jurisdiction of the High Court. Such outright exclusion of judicial must though be distinguished from the channelling of review in specialist fora, as endorsed by the Supreme Court in *Cart* and *Eba*.[10] When *Cart* had been argued at first instance, it had been joined by *U v SIAC*,[11] in which it was held that the Special Immigration Appeals Commission – another of the specialist tribunals dealings with security-sensitive matters, often in closed proceedings – was subject to judicial review. The judgment in *Privacy International* brings the IPT into line with *U*.

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[6] Regulation of Investigatory Powers Act 2000, s 67(8) (as enacted).
[7] [1969] 2 AC 147.
[8] Asylum and Immigration (Treatment of Claimants, etc.) Bill (Bill 5) clause 10, which would have inserted a new section 108A into the Nationality, Immigration and Asylum Act 2002.
[9] [2005] UKHL 56, [102] and [104].
[10] *R (Cart) v The Upper Tribunal* [2011] UKSC 28; *Eba v Advocate General for Scotland* [2011] UKSC 29.
[11] *U v Special Immigration Appeals Commission* [2009] EWHC 3052 (Admin).

3. The national security dimension

In *Privacy International* the original proceedings – which will, now that this preliminary issue has been determined, be reviewed by the High Court – related to the legality of 'equipment interference' ('hacking') carried out by the security agencies. More specifically, they addressed the legality, under section 5 of the Intelligence Services Act 1995, of warrants authorising such interference which are 'thematic', meaning that the property to be interfered with is not directly specified, but rather identified only by reference to some category to which it belongs.[12] When the applicants sought to challenge the conclusion that such warrants were lawful by way of judicial review, the Divisional Court held that it could not do so,[13] a decision upheld by the Court of Appeal.[14] The latter judgement is of particular interest in that it treats the reviewability of the IPT not, in the first place, as a question of constitutional principle but rather as a pragmatic issue concerning the implications of allowing the decisions of the IPT, a specialist tribunal with highly distinctive – largely closed – procedures, to be challenged within the ordinary courts.[15] As Lord Justice Sales said in endorsing dicta of Lord Brown in *R (A) v B*,[16] to interpret the RIPA ouster clause as permitting judicial review of the IPT's work 'would permit the special procedural regime established for the IPT to be bypassed at the stage when judicial review proceedings in respect of its decisions are brought in the High Court.'[17]

Compared to that decision of the Court of Appeal, a striking feature of the Supreme Court's decision is an absence of sustained concern for the sensitive nature of the IPT's work and the implications of opening up that work to the supervision of the ordinary courts. This is not, however, mere happenstance. The majority in the Supreme Court was able to skip lightly over this point only because of a decision of that Court itself which was handed down in the period between the decisions of the Court of Appeal in *Privacy International* and that of the Supreme Court. In *R (Haralambous) v Crown Court at St Albans* the Supreme Court held that where there is statutory authority for the holding of a closed hearing, any judicial review of the decision taken subsequent to that hearing may itself take place in closed proceedings, whether or not there is statutory

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12 *Privacy International/Greennet v The Secretary of State for Foreign and Commonwealth Affairs and The Government Communications Headquarters* [2016] UKIP Trib 14/85-CH. See Paul F Scott, 'General warrants, thematic warrants, bulk warrants: property interference for national security purposes' (2017) 68 *Northern Ireland Legal Quarterly* 99.

13 *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWHC 114 (Admin).

14 *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWCA Civ 1868.

15 See, eg, [2017] EWCA Civ 1868, [7]-[12].

16 *R (A) v B* [2009] UKSC 12.

17 [2017] EWCA Civ 1868, [48].

authority for doing so.[18] Though the majority did not explicitly say so, *Haralambous* went a considerable way to blunting the force of several of the key pragmatic arguments against the availability of judicial review of the IPT. No longer would a decision that the RIPA ouster clause was ineffective risk a situation in which a judicial review of the IPT's closed work took place in open court. This willingness to look past the national security context contrasts starkly with Lord Sumption's rejection, in dissent, of the claim that subsequent case law should influence the interpretation of the RIPA ouster clause:

> It was submitted to us that Parliament's concerns on this score were unjustified, because as the law was (wrongly) understood in 2000, closed material procedure was available in High Court proceedings. This submission is in my view misconceived. For the purpose of construing the Act, what matters is whether Parliament had those concerns, not whether they were justified. The terms of the Act are themselves enough to show that it did.[19]

Interpretation was therefore to take place by reference to the original intent of Parliament, and was not to be modified in light of subsequent developments. The result is a striking example of the way in which the long timelines of litigation potentially interact with judicial decision-making. The judges of the Supreme Court will of course have known at the time of the decision in *Haralambou*s that *Privacy International* was headed inexorably in their direction, and though it is nowhere mentioned in that judgment, it surely nevertheless cast its shadow. Two of those who signed onto the Court's unanimous judgment in *Haralambous* – Lords Kerr and Lord Lloyd-Jones – were later in the majority in *Privacy International,* with the former case clearing the ground for a purely constitutional approach in the latter.

4. The majority

The issue which framed the Court of Appeal's consideration of the point having been banished, the majority of the Supreme Court was able to address the question of the RIPA ouster clause's effect in purely constitutional – and so broadly conventional – terms: as a question, that is, of whether the statutory language was, in accordance with Lord Hoffmann's principle of legality, suitably explicit to override or limit a principle (the rule of law) of high constitutional importance. Given that the clause at issue in *Anisminic* was held not to be sufficiently explicit, the question then

[18] *R (Haralambous) v Crown Court at St Albans* [2018] UKSC 1.
[19] [2019] UKSC 22, [196].

became whether the parenthetical addition – 'including decisions as to whether they have jurisdiction' – was sufficient to render so its RIPA equivalent. In holding that it was not, the Supreme Court suggested that the additional words were not therefore necessarily otiose. They might, for example, serve to exclude review of the decisions of the IPT on factual rather than legal grounds. But even if that were not the case, the bare truth was that Parliament had not legislated in sufficiently clear terms to exclude judicial review of the Tribunal's work, and if it 'failed to make its intention sufficiently clear, it is not' said Lord Carnwath, 'for us to stretch the words used beyond their natural meaning.'[20] Here an important nod is made to the underlying logic of the principle of legality in its classic formulation: it may be, said Lord Carnwath, that a more explicit clause was not included was that – as happened to the more robust, probably entirely *Anisminic*-proof, clause in the 2003 example – that a clause more explicit about Parliament's intention to protect the Tribunal's decisions against judicial review 'might not have been expected to survive Parliamentary scrutiny.'[21] The principle of legality is an interpretive presumption, we are reminded, which leverages the legal constitution in service of its political equivalent.

Having resolved the first point in favour of the claimants, the Supreme Court was not here required to determine the second point: whether an ouster clause could ever successfully protect a decision against judicial review. What was offered instead was the claim that there is a 'strong case' for holding that 'consistently with the rule of law, binding effect cannot be given to a clause which purports wholly to exclude the supervisory jurisdiction of the High Court to review a decision of an inferior court or tribunal, whether for excess or abuse of jurisdiction, or error of law.'[22] These are the next stage in the evolution of the Jackson dicta, more carefully expressed – reflecting, perhaps, the less heated constitutional background which now prevails (at least as regards judicial review). There are several points of interest. One is that these dicta belong to a mere plurality of the Court: Lord Lloyd-Jones explicitly declined to express a view on this question.[23] A second is that, elsewhere in his judgment, Lord Carnwath seems to go further, stating that 'it is not I believe in dispute… that there are certain fundamental requirements of the rule of law which no form of ouster clause (however "clear and explicit") could exclude from the supervision of the courts' including both 'excess' and 'abuse' of jurisdiction.[24] That is, though the question of whether all judicial review might lawfully be ousted is left open, it is clearly stated

[20] [2019] UKSC 22, [111].
[21] [2019] UKSC 22, [111].
[22] [2019] UKSC 22, [144].
[23] [2019] UKSC 22, [168].
[24] [2019] UKSC 22, [122].

(though again, in obiter, and only by a plurality) that large swathes of judicial review might not be so; that, by implication, a clause which purported to do so would have no effect. Third, lingering in the background of the discussion throughout the judgement is the oft-neglected distinction between judicial and executive bodies, with the implication that the effect of the same ouster clause might differ as between the two situations.[25] Finally, there is an attempt in this passage of the judgment to suggest – perhaps even to argue – that the rule of law (understood, as usual, primarily if not exclusively as a question of the availability of judicial review) is not a denial of Parliament's sovereignty but rather its affirmation.[26] Though the point is note stressed, this move beyond the framing of opposition which is so central to *Jackson* suggests a rhetorical way forward in the event that the courts encounter an ouster clause which fulfils the *Simms* criteria.

5. The dissents

There were two dissents in the Supreme Court: one from Lord Sumption (with whom Lord Reed agreed) and another from Lord Wilson. The former proceeds on the basis that all inferior tribunals have a 'permitted field' of action – determined by the construction of the relevant statute – and that the effect of an ouster clause will depend upon the interpretation of that clause against the background of this permitted field. Here, the IPT was acting within its permitted field, even if the error it was alleged to have made was one characterised as jurisdictional. It was not the case, however, that the RIPA ouster clause would prevent any judicial review of its failings: rather, it prevents merits review of the IPT's decision, but leaves open – for example – the possibility of challenging the lawfulness of its procedures.[27] On the larger constitutional point, Lord Sumption noted that the argument as to the compatibility of Parliamentary sovereignty and the rule of law was less radical than the opposition set up in *Jackson*, amounting – in effect – to a claim about 'the conceptual inconsistency between an ouster clause and the existence of limits on the jurisdiction of the Investigatory Powers Tribunal.' Accepting this ('up to a point') Lord Sumption reframed as a question, once again, of Parliamentary intention: 'If Parliament on the true construction of an enactment has created a tribunal of legally limited jurisdiction, then it must have intended that those limits should have effect in law' and so 'Parliament's intention that there should be legal limits to the tribunal's jurisdiction is not… consistent with the courts lacking the capacity to enforce the limits.'[28] Though it would remain open to Parliament to escape this logical bind by

[25] [2019] UKSC 22, [32] and [182].
[26] [2019] UKSC 22, [114], [160], [208]-[210].
[27] [2019] UKSC 22, [205].
[28] [2019] UKSC 22, [210].

creating either 'a tribunal of unlimited jurisdiction or one with unlimited discretionary power to determine its own jurisdiction' it would be a 'strange' thing to do.[29] That is, a complete ouster of judicial review is theoretically possible, but would have to be signalled in the most explicit of fashions. Whether the abortive ouster clause from the 2003 Bill would have sufficed is not addressed. Rather, Lord Sumption notes, pointedly, that such a thing 'has never been done.'[30] Lord Wilson's dissent is more strident: deprecating the judgment in *Anisminic* and the 'linguistic confusion' which followed from it, as well as Lord Sumption's attempts to split the difference, he too treats the question as one of clarity, and arrives at the opposite conclusion to the majority: Parliament intended to exclude all judicial review of the IPT's decisions, whether for jurisdictional or 'ordinary' error of law, and that in respect of the latter (at least) is was permitted to do so.[31]

6. Conclusion

Privacy International is the new leading case on the effect of ouster clauses. Considered from that point of view, however, it adds precious little to the prior case law: the key question of whether judicial review can ever be ousted entirely is left open, as is the question of what an ouster clause capable of doing so might look like. More important is, first of all, the re-emphasis of the political dimension of the principle of legality and, second, the softening of the relationship between sovereignty and the rule of law. The judgment indicates a desire – if not yet an obvious way – to reconcile the two within a single constitutional whole. Behind these constitutional issues there is evident a welcome refusal to fall back on national security exceptionalism. Though the practical significance of the decision is diminished by the institution of a right of appeal from the IPT, the effect of this decision is to confirm its position within a single judicial hierarchy.

[29] [2019] UKSC 22, [210].
[30] [2019] UKSC 22, [210].
[31] [2019] UKSC 22, [230]-[232].